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Crimainl Appeal No.787 of 1987

Date of Decision: 30.6.1995.

For Approval and Signature:

HONOURABLE MR.JUSTICE B.C.PATEL.

HONOURABLE MR. JUSTICE M.R. CALLA

1. Whether Reporters of Local Papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? No
3. Whether Their Lordships wish to see the fair copy of the judgment? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any other order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

Mr.S.A.Baqi, learned counsel for the appellant.

Mr.M.A.Bukhari, learned A.P.P. for the respondent.

CORAM: B.C.PATEL & M.R.CALLA JJ.

(30.6.1995)

ORAL JUDGMENT: (PER PATEL J.)

1. The appellants, who are convicted by the Addl.Sessions Judge, Surendranagar for the offences punishable under Sections 302, 201 read with S.34 of the

I.P.C. and also for an offence punishable under S.302 read with S.34 of the I.P.C., have preferred this Appeal.

2. Certain facts, as emerges from the records, are as under:-

That on 22-11-86 near Ratudi vav of Chotila, district -Surendranagar dead body of one Panu, daughter of Trikambhai Manabhai was found and on the person of the deceased, there were injuries by means of a razor and stones. It is the prosecution case that the appellant No.1 intentionally caused death of Bai Panu by causing injuries by means of razor and stone and while accused No.2 aided and abetted appellant No.1 in the commission of crime.

3. The case rests solely on circumstantial evidence.

One Ranjitsinh-P.W.10 informed Lakubha Vakhatsang-P.W.9 retired Police Constable about the dead body lying near Ratudi vav and on bicycle he reached the place and found the dead body and he informed the police. R.P.Patel-P.W.25 on receipt of this information, visited the place alongwith other police personnel and drew the Panchanama Ex.60 and, thereafter, forwarded the dead body for post mortem examination. One Photographer Pankajbhai-P.W.24 took the photograph of the person of the deceased in the presence of Investigating Officer and also of the scene of offence i.e. where the dead body was lying. Further investigation was entrusted to R.P.Trivedi-P.W.27. During the investigation, it transpired that deceased was residing at the relevant time at Surat and in company of appellants came to Chotila. After committing murder of deceased Panu, appellants left the place. Appellants had injuries at the time of their arrest. On recording the statements of persons, police prima facie came to the conclusion that in S.T.Bus, appellants and deceased travelled from Surat to Dholka and, thereafter, they reached Chotila where they were seen by witnesses. Not only that but in a rickshaw the appellants returned from the place situated near Ratudi Vav and at that time they were injured. Police filed charge-sheet against the appellants and the accused were committed to the Court of Sessions as the case was exclusively triable by the Court of Sessions. The learned Judge framed charge vide Exh.3 on 24-6-87 to which the appellants pleaded not guilty and contended that they are entirely innocent and have not committed any offence. The trial court on appreciation of evidence, oral as well as documentary, and considering the statements of appellants and submissions made by the learned counsels, accepted the prosecution case and

convicted the appellants, as stated above. It is against that order the present Appeal is preferred.

4. When a case is based on circumstantial evidence, following conditions must be verified before a case against the accused can be said to be fully established:

1. The circumstance from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must or should" and not "may be" established,
2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
3. The circumstances should be of a conclusive nature and tendency,
4. They should exclude every possible hypothesis except the one to be proved, and
5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused and the accused alone.

The court has to also bear in mind that in a case depending on circumstantial evidence, there is always the danger that conjecture or suspicion may not take the place of legal proof. Keeping this established principle in mind, we have to appreciate the evidence.

5. Motiben-P.W.15-mother of the deceased has deposed that Manjula-3rd daughter of Motiben was residing at Surat with her husband. Panu-the deceased, second daughter of the witness, was divorced. Mangabhai was requested to convey information if there is any person with whom Panu can be settled. Deceased Panu was residing at Surat with one Vaghji. Manjula-daughter of Motiben informed that Panu-the deceased has illicit relations with Govind-the appellant. Witness Motiben and others went to Surat at the place of Vaghji, where Panu and Govind were there. They went to see a movie. Govind-appellant is a married person. His first wife expired and, thereafter, he got married again and that

lady is residing with her parents. Panu was persuaded not to marry, but Govind said that on account of love, he wanted to marry. The deceased Panu did not return. In the cross-examination it transpired that Panu was married at Ahmedabad first. She was a fashionable woman and, therefore, she had no liking for the house at Amraiwadi, where she had to reside. Thereafter, she was residing with one Naran Keshav at Bombay as his wife. That Naran Keshav had a living wife. As Naran's wife filed a suit, Panu was relieved. Thereafter, at Jogeshwari she got married with one Keshav, who told that she is black and he had no liking for her. She stayed with Motiben for a period of one year or above and, thereafter, she was asked to stay with Vaghjibhai. Thus, from this evidence, it appears that appellant had illicit relations with deceased Panu. It appears that appellant No.2-Dahiben is residing in the nearby house of the appellant No.1.

6. With a view to prove that deceased and the appellants travelled together, prosecution examined Desaibhai-P.W.6 and Fakruddin-P.W.7 conductor and driver of the bus respectively. According to the evidence of Desaibhai it transpires that on 20th and 21st he was a conductor in S.T. Bus on Surat-Junagadh road. The bus left Surat at about 2.30 A.M.. Fakruddin was the driver of the bus. He new Govind-the appellant very well. He was serving in the S.T. Depot. He was travelling in the said S.T. Bus alongwith two ladies. Appellant No.1 and appellant No.2 were travelling together. His duties were upto Dholka and, thereafter, he got down from the bus. He was shown the photograph mark-A and on seeing, he has stated that the lady, who was travelling with the appellant, was the same lady, who appears in the photo. He has stated that as Govind belongs to the staff of S.T. no ticket was issued. Desaibhai has stated that on that day Govind had put on a Khaki cloth and he has pointed out the pant-article 57 and bush shirt-article 58, which were put on by Govind. Mr.Baqi, learned advocate, stated that even if this evidence is accepted, at the most it can be said that they travelled together from Surat to Dholka and not further. Evidence of Fakruddin is to the said effect. He has further stated that at Dholka in the company of appellants and one other lady, they went for a cup of tea, where it was discussed that they wanted to go to Chotila for offering prayers. It is suggested to this witness that there was no woman shown in the photo with appellant Nos.1 and 2. It was also suggested that they have not stated that they wanted to go to Chotila for offering prayers. This suggestion indicates that the

lady, who appears in the photograph, was not travelling with them. This suggestion is denied and even if the evidence of these two witnesses, namely, Desaibhai and Fakruddin is accepted, it indicates that the appellants and the other lady were travelling together upto Dholka. There is no evidence on record to show how they travelled from Dholka to Chotila. There is no evidence on record to show as to what distance one will have to travel for reaching Chotila from Dholka. Prosecution has not led any evidence in this behalf.

7. However, prosecution has examined Kishorsinh-P.W.16, who has a shop in the name of Aarihant Stores. He has stated that appellants came for purchasing a water bag. He collected Rs.10-50 Ps. for the same. This witness is declared hostile. It appears that he has not supported the prosecution version that one other lady was also with the appellants. In the cross-examination, he has admitted that both the persons were unknown. His statement was recorded after 5 - 6 days. He has admitted that he would not be able to recognize unknown persons. However, he has stated that he recognized the persons, who came at the time of purchase of article, and they are the same who are before the court. He has admitted that there was no identification parade. Prosecution has examined Pravinchandra-P.W.17, who has a cutlery shop at Chotila. In the said shop they are also selling acid for cleaning tiles. He has deposed that appellant No.2 asked for acid bottle - article 50, which is a Peacock Brand, and the same was given to her. He has stated that he did not know appellant No.2. He has stated that he can possibly say that appellant No.2 came to purchase the article. She had put on Maroon colour sari and she is a thin woman and, therefore, he is able to identify. He has admitted that the Police Sub Inspector Patel is present in the Court. He has also stated that there was no identification parade to identify the woman.

8. From the evidence of these witnesses, it is suggested by the prosecution that the appellants and the deceased were together at Chotila. It is required to be noted that accused were not known to these witnesses. There was no special reason for witnesses to remember these persons. On account of a peculiar occasion if a person is seen, one can remember or if some incident had happened, one can remember. But casually on a shop, if a person comes and purchases certain article, it is difficult to accept that he would remember the person by face. The Apex Court in the case of Kanan v. State of Kerala, AIR 1979 Supreme Court 1127 has observed as

under:

"Where a witness identified an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T.I.parade to test his powers of observations. The idea of holding T.I. parade under Section 9 is to test the veracity of the witness on the question of capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court."

9. Prosecution has examined Chandulal-P.W.20,who was working at the relevant time as Post Master at Piyava. He has deposed before the court that he was travelling before 8 to 9 months in a rickshaw of Ramesh, which was going towards Chotila. The time was about 3.0 P.M. Six or seven passengers were taken. There is one Ratudi Vav. From there two persons boarded the rickshaw; one lady and one gentleman and they got down at Highway road. However, this witness has not supported the prosecution and had not identified the appellants. Prosecution has examined driver Rameshchandra P.W.23 of the said rickshaw. He has deposed that two persons boarded the rickshaw; a man and a woman. They boarded from the place known as Ratudi Vav. He has identified the accused-appellants. He has stated that the woman had injury. The man, who was accompanying her, had a bleding injury. He has admitted that prior to the incident,he had not seen these persons. They were shown by the police and,thereafter, they were seen in the court. No parade was held by the police. For the aforesaid reasons,their identification can not be accepted.

10. Thus,there is no satisfactory and acceptable evidence that the appellants and the deceased travelled together from Dholka and reached Chotila.

11. The prosecution has relied on other evidence, namely, recovery of bush shirt and pant and the Sari. However, Jitendra-P.W.5, who is a tailor, who tailored the said pant,has not stated that it was that of the appellant No.1. Kaushikkumar-P.W.13 has deposed about the razor,which was sold by him. But he has admitted that he can not identify the razor or if the customer is shown,he can not identify. He in terms stated that he can not identify the accused No.1 as a person, who came to purchase the article. About the bush shirt, there is no specific evidence indicating that the article is of

the accused. There are other witnesses, who have turned hostile and have not supported the prosecution.

12. Mr.Bukhari,learned A.P.P. submitted that the prosecution case rests on the circumstances that they were last seen together and clothes of appellant No.1 and Sari of appellant No.2 came to be recovered. He also submitted that the appellants sustained injuries and the evidence of Chanudlal-P.W.20 and Rameshchandra-P.W.23 corroborated that these two injured were in the said rickshaw on the date of the incident and boarded from the place known as Ratudi Vav. Appellants were arrested on 1-12-86 while incident took place on 21-11-86. They might have sustained injuries any time in between. The case put up by the accused is that they sustained injuries when they were at Surat,for which prosecution has examined Medical Officer, practicing at Surat. But that itself is not sufficient. Appellant was examined by Dr.Trivedi-P.W.3 on 2-12-86 and according to his opinion,the age of injury was more than six days. That would not help the prosecution. In the absence of specific evidence,it can not be said that injuries were caused at the relevant time.

13. As observed by us, the evidence is very weak to come to a conclusion that the appellants were last seen together with the deceased and that they alone have committed the crime in question and in view of this, benefit of doubt must be given to the appellants and accordingly Appeal is allowed. The order of conviction and sentence recorded by the Addl. Sessions Judge,Surendranagar in Sessions Case No.10 of 1987 on 31-7-87 is set aside.Appeallant No.1 to be released fothwith, if not required in any other case. Bail bonds of appellant No.2 shall stand cancelled.